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No. 86-1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ASPHALT PRODUCTS, CO., INC.
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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12pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

The statement of the case contained in the Petition for a Writ of Certiorari filed by the Commissioner of Internal Revenue is reasonably accurate but requires further explanation. The shareholders of the Respondent, Asphalt Products Co., Inc. ("Asphalt Products") did purchase two trailer-mounted waste water treatment plants that required transportation from California to Nashville, Tennessee. In addition, at about the same time, Asphalt Products purchased two trucks suitable for towing large, heavy trailers

for use in its business. These trucks were available for delivery on the west coast and required transportation from the west coast to Nashville, Tennessee. These trucks were used to transport the shareholders' trailer-mounted waste water treatment plant from California to Tennessee, but the trucks were not sent to California for this specific purpose. Instead, the trucks were to be transported from the west coast to Tennessee by Asphalt Products and the shareholders' treatment plants were also to be transported so that when the Respondent's drivers picked up the trucks on the west coast, they also transported the shareholders' treatment plants back to Tennessee at the same time.

ARGUMENT

THE DECISION BELOW IS NOT IN CONFLICT WITH PRIOR DECISIONS BUT IS DISTINGUISHABLE ON ITS FACTS AND IS A DECISION OF FIRST IMPRESSION PROPERLY DECIDED BY THE COURT BELOW.

The total deficiency assessed against the taxpayer and affirmed in the courts below exceeded \$133,000. However, the courts below decided that the taxpayer was negligent only with regard to deductions deemed improperly taken which resulted in approximately \$500.00 of the \$133,000 total deficiency. Petitioner claims that the decision of the court of appeals to reduce the negligence penalty is contrary to "every other decision that has considered this aspect of §6653(a)."[1] Petition at page 8. In particular, Petitioner

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect during the years in issue.

claims that the court of appeals decision below directly conflicts with the Second Circuit's decision in *Abrams v. United States*, 449 F.2d 662 (1971)(per curiam). While it is true that the court in *Abrams* applied the negligence penalty to the entire amount of the deficiency, the court expressly recognized that a different result might arise "where a comparatively insignificant item of income is negligenty omitted." *Id.* at 664. The Sixth Circuit Court of Appeals properly distinguished the *Abram's* decision on the basis of this observation by the *Abram's* Court and because the facts in the present case fit those of the hypothetical posited by the *Abrams* Court.

Respondent was found negligent for claiming a deduction for expenses incurred in simultaneously transporting two large trucks purchased by Respondent and waste water treatment equipment owned by the shareholders of Respondent. Respondent would have incurred the cost of transporting the trucks from the place of manufacture to Respondent's place of business in any event, and thus determined that the deduction of these expenses was reasonable even though the expenses incurred provided an incidental benefit to the shareholders by transporting the shareholder's equipment. Contrary to Petitioner's assertion in footnote five of the Petition at page 9-10, the expenses incurred clearly were business related in that they were incurred for the transportation of Respondent's trucks to Respondent's place of business. The only evidence presented at trial on this issue clearly shows that the expenses in question were not incurred solely for the benefit of Respondent's shareholders but were reasonable business expenses which conferred an in cidental benefit on the shareholders. *See infra*, pp. 6-7.

PETITIONER'S CITATIONS TO §6653(a)(2) AND THE CONFERENCE REPORT ON THE TAX REFORM ACT OF 1986 ARE NOT CONTROLLING IN DETERMINING THE PROPER APPLICATION OF §6653(a) IN THE PRESENT CASE.

Petitioner cites a reference to the opinion below in the Conference Report on the Tax Reform Act of 1986 as support for its position. Petition at pp. 7-8. The report states that the decision of the Sixth Circuit below was in error. 2 H.R. Conf. Rep. 99-841, 99th Cong. 2d Sess. 779-783 (1986). As additional support, Petitioner also cites §6653(a)(2) which provides an additional penalty of 50% of the interest that is payable "with respect to the portion of the underpayment described in paragraph (1) which is attributable to the negligence." This provision was added to the law in 1981.

The tax year at issue in the present case is 1974. As this court has noted on several occasions, "it is the intent of the Congress that enacted [the section] . . . . that controls." *Teamsters v. United States*, 431 U.S. 324, 354 n. 39, 52 L. Ed.2d 396,97 S. Ct. 1843 (1977). A legislative report from Congress which contains specific disapproval of a court decision cannot be considered as indicitive of congressional intent at the time of the adoption of the statute in question. *Federal Electric Corp. v. Dunlop*, 419 F. Sup. 221 (D.C. Fla. 1976). Only contemporary legislative history may be considered in construing legislation. *Id.* Clearly the Conference Report on the Tax Reform Act of 1986 and a law enacted in 1981 can have little bearing on the interpretation of a statute as it applied in 1974.

However, the Conference Report does evidence congressional intent as to how §6653(a)(1) should be applied for tax years after 1986. As indicated in the Report, Congress has stated that the negligence penalty should apply to the entire underpayment and not to the portion due to negligence. The Court's review in this case would thus be limited to interpreting the manner in which §6653(a) should apply for prior tax years. Given the Court's burdensome case load, it is inappropriate for the Court to review a case whose impact has been so limited by Congress.

THE PRESENT CASE IS AN INAPPROPRIATE ONE FOR DETERMINING THE PROPER APPLICATION OF §6653(a) BECAUSE THE FINDING OF NEGLIGENCE IN THIS CASE RESULTS FROM AN IMPROPER AND INCONSISTENT APPLICATION OF THE LAW BY THE COURTS BELOW AND IS CLEARLY CONTRARY TO THE EVIDENCE.

Petitioner has requested that this Court review the application of §6653(a) by the Sixth Circuit Court of Appeals. Such a review is inappropriate in this case because the Tax Court improperly imposed negligence *per se* on the taxpayer for claiming deductions which the taxpayer stipulated at trial were nondeductible. According to established case law, the Tax Court should have looked to all the facts and circumstances in reaching it decision to impose a negligence penalty. See *Finney v. Commissioner*, 39 T.C.M. 938, 954, T.C. Memo, 1980-23. Asphalt Products' stipulation as to nondeductibility clearly disallows the deductions as a matter of law, but that fact standing alone will not justify the imposition of the negligence penalty prescribed by §6653(a). Rather, the Commissioner may

impose the penalty only where all the facts and circumstances evidence "negligence or intentional disregard of rules and regulations." I.R.C. §6653(a); *see DeFelice v. Commissioner*, 25 T.C.M. 835 (1966); *Oleander Co., Inc. v. United States*, 82-1 U.S.T.C. ¶9395 (E.D.N.C. 1981). The only evidence introduced at trial in the present case on the question of negligence as to the deduction of the claimed expenses showed a reasonable basis for the allowance of these deductions. An examination of this evidence reveals that the Tax Court in the present case failed to use the proper standard in applying §6653(a).

The following testimony of William B. Akers, a principal shareholder and officer of Asphalt Products is the only evidence introduced at trial by either side on the issue of the taxpayers' negligence in claiming deductions for the expenses incurred in transporting the corporation's trucks and the shareholder's equipment across the country.

> We were buying Kenworth trucks at that time, two big tractors with fifth wheel plates on them. Kenworths are made in, wherever it is, Seattle, Washington. All this happened at about the same time. The trailers were available to be moved in California, they needed to get them off the lot, we had purchased them, Kenworth had two trucks ready for us that Lester Turner at Kenworth would be bringing across the country. We said, look, the trucks are on the west coast, the trailers are on the west coast, just drop down and pick them up and come across. That's how Asphalt Products' trucks brought those trailers in and the trailers belonged to us. We didn't see that that was any great expense to Asphalt Products. The trucks were coming across anyway. They picked them up. I think we did license them out there rather than have Lester bring them in under a dealership so that Asphalt Products took possession at the factory, drove them in here, hooked those trailers on. So the mileage was practically the same for the trucks and that's how they came in. As I recall, I made all those arrangements because Lester was selling us the trucks. He may have made them, but that was what happened. We did not send a truck to California to bring those trailers back here.

Trial Court Transcript at 79-80.

This testimony reveals that the expenses of transporting the trucks across the country would have been incurred by the corporation in any event. Because both the trucks and the trailers required transportation back to Tennessee, the trucks were used to transport the trailers, providing an incidental benefit to the shareholders. The deduction by the corporation of the expenses incurred in transporting two trucks for use in its business is reasonable even though the expenses incurred also provided an incidental benefit to the shareholders. Therefore the finding of negligence in this case cannot be justified on the basis of evidence presented or prior case law.

This Court's duty to interpret the laws of the United States will be poorly served if the present case is chosen for review of the proper application of §6653(a). Clearly, it is more appropriate for the Court to review a case in which the finding of negligence, which is prerequisite to the application of §6653(a),

is consistent with prior case law and can be clearly supported by the evidence. If the Court reviews the present case to determine whether the negligence penalty may be applied to only a portion of the total deficiency owed by a taxpayer, the Court's opinion will by implication approve the finding of negligence in this case. Such an approval represents a considerable broadening of the scope of §6653(a) in defining "negligence" as it is used in this statute.

A review of the present case will also negatively affect the use of stipulations in tax litigation. The Respondent's stipulation as to nondeductibility of the expenses incurred for the transportation of the corporation's trucks and the shareholders' equipment resulted in a *per se* finding of negligence by the Tax Court. If the Court uses the present case to review the alleged conflict in the application of §6653(a) between the courts of appeals, again, the Court will necessarily imply that the Tax Court's application of the *per se* rule of negligence as to expenses which are stipulated to be nondeductible is proper. Such a result will force taxpayers to litigate even relatively insignificant adjustments or face application of the negligence penalty. The Petitioner's argument at page 12 of the Petition that an affirmation by this Court of the Tax Court's application of §6653(a) will decrease the complexity of tax litigation ignores the fact that a taxpayer facing application of the negligence penalty must litigate each and every adjustment in order to avoid the negligence penalty on the entire deficiency if the Tax Court's application of §6653(a) is held proper.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: March 9, 1987.

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